In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

AMERADA HESS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, in this case, but only if the Court grants the petition for a writ of certiorari in No. 75-375.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. 37a-81a)[1] are officially reported at 61

[1] "Pet. App." references are to the separately bound appendix to the petition in *White Farm Equipment Company* v. *Commissioner*, No. 75-375.

T.C. 189. The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 517 F.2d 75.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1975. On August 4, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari in this case to and including October 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the value of shares of stock issued to respondent for its assets should be determined by the mean stock exchange price on the valuation date, less an adjustment for blockage, as the court of appeals held, or by the formula price provided by the exchange agreement between the parties.

STATEMENT

On October 31, 1960, White Motor Company (White Motor) acquired substantially all the assets of the farm machinery business of Oliver Corporation (Oliver), in exchange for 655,000 shares of White Motor stock plus $1,508,550 in cash and the assumption by White Motor of $281,396 of Oliver's liabilities (Pet. App. 12a). The terms of the transaction were set out in an agreement executed October 3, 1960, which was approved by the shareholders of both corporations (Pet. App. 5a-7a). The agreement con-

tained a formula, based on book value, for determining the value of the Oliver assets, and provided that the 655,000 shares of White Motor stock were to be accepted in payment of the purchase price of the Oliver assets at an assigned value of $31,767,500, or $48.50 per share (Pet. App. 7a-8a).

On its 1960 federal income tax return, Oliver reported a loss on the disposition of the assets of its farm equipment business (Pet. App. 13a). In computing the amount realized on this exchange, Amerada Hess (successor by merger to Oliver) reported the fair market value of the White Motor shares received in the exchange at $36.3125 per share, which was its mean trading price on the New York Stock Exchange as of October 31, 1960 (Pet. App. 12a-13a). However, in its federal income tax returns for 1960, 1961, and 1962, White Farm Equipment Company (a subsidiary of White Motor, holding the assets received from Oliver) computed its basis in the assets received from Oliver as corresponding to a value of $48.50 per White Motor share, which was the price assigned to the shares in the agreement (Pet. App. 13a).

In order to protect the revenue, the Commissioner took inconsistent positions with respect to the correct valuation of the White Motor shares exchanged and asserted deficiencies against both White Farm Equipment Company and respondent (Pet. App. 13a). The cases were consolidated in both the Tax Court and the court of appeals, and the Commissioner has been essentially a stakeholder, whose

primary concern has been to insure that the valuation of the shares should be treated consistently by both parties to the transaction (Pet. App. 13a-14a). However, on the merits, the Commissioner adopted the position of Amerada Hess, and argued in both the Tax Court and the court of appeals that the fair market value of the White Motor shares should be measured by the mean trading price on the New York Stock Exchange as of October 31, 1960, less a discount for blockage.

The Tax Court valued the White Motor shares at $48.50 per share, based on the agreement of the parties, in accordance with the position of White Farm Equipment Company (Pet. App. 67a). The court of appeals reversed, holding that the shares should be valued on the basis of the mean New York Stock Exchange market price, less a discount for blockage (Pet. App. 26a).

REASON FOR GRANTING THE WRIT

There is presently pending a petition for a writ of certiorari (No. 75-375) in *White Farm Equipment Company* v. *Commissioner*, challenging the decision of the court of appeals in that case, which was consolidated with this case below. The Commissioner intends to oppose that petition. Should the Court grant that petition, however, it should also grant the present petition, in order to insure that both White Farm Equipment Company and respondent will be required to use the same value for the shares exchanged.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, but only if the Court grants the petition in No. 75-375.

ROBERT H. BORK,
Solicitor General.

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